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ABSTRACT

This speech reviews the power of school boards with respect to dismissal, and identifies implications of due process for supervision and evaluation, particularly as it relates to incompetence as a basis for dismissal. The first section defines the state-sanctioned powers of a school board, including the difference between discretionary and ministerial acts, open and closed meetings, and statutory or locally established rules of procedure. The second section defines the key legal terms in cases of dismissal: substantive and procedural due process, property interest, and liberty interest. Eight Supreme Court guidelines for procedural due process are provided. The third section, on implications of due process for supervision and evaluation, lists general categories of teaching behaviors which might constitute incompetency: teaching methods, effects on pupils, teacher's personal attitude, and knowledge of subject matter. Fairness in the supervisory process requires that teachers have (1) knowledge of expected standards of performance, (2) opportunity for constructive criticism, (3) opportunity to improve, and (4) time to improve. Adequate documentation is essential throughout the supervision and evaluation process. The final section provides advice for termination hearings, and two appendixes are included: (1) a sample agenda for a contract cancellation hearing, and (2) a sample notification of termination. (TE)

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WHAT YOU OUGHT TO KNOW ABOUT TERMINATION AND DUE PROCESS

Martha Barton

Paper presented at the Annual Meeting of the National School Boards Association, Houston, Texas, March 31-April 3, 1984.

EA 017 007

Martha Barton
D-70

1984 NSBA [illegible]
Clinic No. D-70 Barton (Alabama)

What You Ought to Know about Termination and Due Process

(NSBA 1984 Special Interest Clinics Program, April 2, 1984; 9:00 a.m.)

Telling school board members what they "ought to know about termination and due process" in twenty minutes reminds me of a statement by one of Dr. Wernher von Braun's chief aides some 20 years ago. When President John Kennedy took office, he pledged that the United States would place a man on the moon in the decade of the 60's. At that time, we had not had a successful space mission at all; the Vanguards had been disappointments to the military, the politicians and the public. When Dr. von Braun came to Huntsville, AL, to direct the National Aeronautics and Space Administration, he directed his closest associates to embark upon a crash program, designed to ensure a successful American mission in space, without another embarrassment. And the team responded, prompting one of the key members to say, "a crash program is taking nine pregnant women and producing a baby in one month." Telling you what you need to know about termination and due process, and doing so in twenty minutes, borders on being synonymous with taking nine pregnant women and producing a baby in one month. I can't perform such a feat, nor will I attempt to do so. I can, perhaps, give board members some guides to asking some pertinent questions of their superintendents and/or other administrators.

My intent is to set a framework in which I will review powers of boards generally and define some key terms. Then, I will discuss dismissal as a concept, dealing with key constitutional issues. Third, I will attempt to identify some implications of due process for supervision and evaluation,

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particularly as it relates to incompetence, which may be the most difficult or challenging charge for dismissal. Finally, I will offer you some examples from my state that may serve as useful guides when adapted to your state.

Introduction

The United States Constitution, by not so providing, has delegated responsibility to the states for public education. While the various states have room for diversity in some areas (curriculum, length of school day/year, certification), U. S. Constitutional interpretations and federal legislation require some uniformity of services (First Amendment rights, Bill of Rights for the Handicapped).

"With two exceptions, a state has complete power with respect to determining the organization and control of local school systems," i.e., conflicting constitutional provisions at the federal and state levels and conflicting legislative provisions at the federal level. (Hudgins & Vacca) In summary, Constitutional requirements always prevail over statutory requirements; federal legislation always prevails over state legislation.

Education then is a state function, carried out locally in the various school districts by local boards of education. Local boards have no inherent power; their powers have been delegated by the state. It is important to remember that that which is given can be taken away; it can also be enlarged.

Since the powers and duties of local boards of education are established by the laws of the state, the powers and duties of a board in one state may vary from the powers and duties of a board in another state. However, there is much in common among the states, whether the result of action of the legislatures or rulings of the courts. For example, most (if not all) states have tenure statutes, but the provisions may vary from state to state.

A school board may exercise its powers and perform its duties only when it functions as a corporate body. That exercise of power and performance of duty

is legal only when the board members act as a unit, in a legal meeting of the board. No individual board member possesses any power or authority to act for the board. Thus, any order or pronouncement by an individual board member is only that - a pronouncement of one person.

Boards of education perform both discretionary and ministerial acts. A discretionary act requires judgment by the board; it usually involves debate or discussion. Discretionary acts cannot be delegated, although assistance may be sought during the consideration/discussion stage. An example of a discretionary act is employing/dismissing specific school personnel. A board must act on employment. Therefore, the employment of "Joe Blow" is a discretionary act.

A ministerial act does not involve judgment by the board, i.e., it does not involve policy making. It is considered as routine and may be delegated. Some examples of a ministerial act are board correspondence, publishing a financial statement, or preparing a budget for approval.

Personnel cases may result from discretionary or ministerial acts. If a board dismisses an employee for impermissible reasons (for example, a dismissal resulting from the exercise of freedom of speech), it will have erred in the performance of a discretionary act. If an employee was not properly notified of the date and time of the hearing (an act usually delegated to the superintendent), the board will have erred in the performance of a ministerial act.

Boards act legally only when they act as a board, in various types of meetings. This is such a commonly recognized fact that boards should not continue to get into trouble on this point. A special meeting requires a special notice, said notice giving date, time, place and purpose of the meeting. Any business transacted other than what was stated in the notice would not be considered as being legal, with limited exceptions. A closed meeting, if permitted at all,

can occur only according to state statute. Business may be conducted only as provided by the statute. An executive session is a private conference by the board. It is for discussion only; thus, no action should be taken by the board. If the discussion prompts a need for action, the board should convene in an open meeting to take such action, and the open meeting has to conform to the requirements of law for regular or special meetings. Note: Some statutes permit action to be taken in executive session but require that the action be reported immediately. For this reason, boards may consider establishing as a procedure that action will be taken in an open meeting.

A board should have established rules of procedures. These frequently are embodied in the board's policies; once such rules are established, they are as binding as statutes. Remember that constitutional requirements prevail over statutory requirements, and statutory requirements prevail over locally established policies, rules and regulations. Assuming no conflict, follow your own rules; always follow the statutes; always follow the constitutional requirements. Any policy of the board not embodied in statute or constitutional provision, i.e., a creation of the board's, may be suspended by the board. However, this should not be confused with ignoring one's own policy.

Termination and Due Process. Dismissal as a Concept

At the outset, bear in mind that you can't keep someone from taking you to court, but you can take steps that might insure that you will win when you get there.

Some legal/technical terms need to be in the vocabulary of all board members if the board is to win when it goes to court. These include due process, both substantive and procedural, and property and liberty interest.

First of all, a property or liberty interest entitles a person to procedural due process. What is a property interest? A property interest is created by the

state, through laws, rules, etc. For example, in a state with a tenure statute, a property interest exists if the employee has an implied right to continued employment. Therefore, dismissal of a tenured teacher requires procedural due process. Further, a non-tenured employee under contract has a property interest to complete that contract period; dismissal during the contract period requires procedural due process.

What is a liberty interest? The U. S. Supreme Court, in Board of Regents v. Roth (1972) "defined a liberty interest when the cause for nonrenewal of a teacher's contract could damage the teacher's standing in the community and/or when the negative inferences people might make from the board's action could close the teacher off from other professional opportunities." In short, the employee would not be at liberty to obtain other employment. In such instances, procedural due process must be provided. The courts have distinguished between dismissal and nonrenewal in finding a liberty interest. In a federal district court case (Louisiana 1975), the court held "that nonretention might make a teacher less attractive to other school systems does not constitute a deprivation of liberty..."

Because the courts have focused on the facts of due process procedures rather than the facts of the case, the failure to follow due process procedures usually has been the basis of court decisions which have gone against boards. What, then, are the requirements of procedural due process? Guidelines established by the U. S. Supreme Court (Goldberg v. Kelly, 1970) require:

1. An opportunity to be heard, at a meaningful time and in a meaningful manner
2. A timely and adequate notice of the hearing that details the reasons for the action being considered ("details the reasons" means in sufficient detail that a person can respond)
3. The opportunity to confront and cross-examine witnesses

4. The opportunity to present oral and written evidence and arguments in his/her own defense
5. The right to obtain an attorney
6. An objective determination of the case solely on law and evidence brought out at the hearing
7. A written statement of the final decision and the reasons for it
8. An opportunity to a review by an appeal tribunal

A violation of any one or more of these guidelines may overturn a board's actions in dismissal or non-renewal cases. In other words, the courts have established the rules. The board cannot ignore the established rules; doing so virtually assures you will lose your case in court. Know the rules; follow the rules.

Substantive due process provides for the protection of such basic rights as found in the First, Fifth and Fourteenth Amendments (speech, press, religion, assembly, equal protection of the law). A case involving substantive due process would be examined on whether a constitutionally protected right had been "arbitrarily or unreasonably" abridged. (Dolgin)

Implications for Supervision and Evaluation. Dismissal for Incompetence.

It virtually is impossible to over-emphasize the importance of sound and clear policies and procedures governing supervision and evaluation of personnel. Except for a due process violation during the course of the hearing by the Board, the strength or weakness of a dismissal case may well have been determined long before the board convenes. I refer to the adequacy/inadequacy of the supervision and evaluation of personnel performance. More specifically I refer to termination for incompetence or unsatisfactory performance. "Termination for incompetence is not a disciplinary act as is termination for immorality or criminal conviction." (Munnelly) In other words, someone is not necessarily being cited for a willful act. The fault in question is more likely to be one

of omission (i.e., failure to act) than of commission (i.e., choosing to act), although there may be evidence or indicators of both attributes. "Consequently, incompetence and its legal relatives, 'ineffectiveness' and 'inefficiency,' must be proved by reference to the teacher's classroom and building performance." (Munnelly)

Incompetence usually is not defined in tenure statutes; it simply appears as one of several reasons for dismissal. Various court decisions provide the following indications of behaviors which might constitute incompetency.

Teaching methods. A failure to maintain classroom control; failure to adapt to current teaching techniques; physical mistreatment of pupils; poor lesson organization.

Effects on pupils. A failure to get along with pupils; failure to keep self-control; promoting low morale or fear among pupils; acts of commission include relating personal financial or sexual matters in class; attempting to indoctrinate pupils - politically, religiously.

Teacher's personal attitude. Tardiness; refusal to teach; refusal to accept supervision; lack of concern or courtesy. A teacher who brought her record player to class so she could doze while children listened to music was dismissed. So were others who refused to allow supervisory personnel to enter the classroom; who failed to cooperate with other teachers; and who showed lack of self-restraint and tact in dealing with co-workers, pupils and parents.

Knowledge of subject matter. Teachers have been dismissed for specific errors of fact in history and geography and for lack of knowledge in English grammar, spelling and punctuation. (Neill and Curtis)

Most school districts which have successfully discharged incompetent teachers have paid careful attention to due process in the supervisory and evaluation

stages long before the termination proceedings were begun. What are due process concerns at the supervisory and evaluation stages? Due process connotes fairness, and fairness in the supervisory process includes:

1. Knowledge of the standards of performance expected (the right to know)
2. Opportunity to receive constructive criticism and provide feedback (the right to notice)
3. Opportunity to improve performance and to have help in such improvement
4. Sufficient time to pursue the improvement plan

The right to know. The board's personnel policies should be adequate for employees to know what is expected in regard to rules, policies and regulations. Those rules, policies and regulations must be reasonable, defensible and applicable to all employees in a similar category.

The right to notice. The teacher must get information from the supervisory process about the assessment of performance.

The right to improve and get help to improve. Once the teacher has been informed of weaknesses, an improvement program should be agreed upon. If help is needed, the school system will have to demonstrate that help was provided. Note, too, the teacher has the obligation to try to improve, to accept and act on suggestions.

The right to time to improve. How much time is allocated for improvement depends on such things as how serious the weaknesses are, how difficult they are to overcome, and the adequacy of help provided. (Munnelly)

The effectiveness of supervisory and evaluation stages is dependent largely on documentation, or developing the record. It is important that administrators and supervisors understand the importance of the record. For example, a written communication to the teacher confirming the agreements or points in the evaluation conference may later become documentation in a dismissal case. Once shared with the teacher, the statement has been made. It must stand alone, explaining itself

or failing to do so. Understand that when the record is evidence in the hearing, it may be attacked by an adversary third party. This adversary third party has no need to understand the principal's or supervisor's position; the intent will be to attack the information, procedures or judgments. It will search for weakness in the documentation, and it will play any flaw as evidence of the wrongness of the judgments of administration or board.

McDaniel and McDaniel offer a pretty good list of do's for administrators, supervisors and board members in relation to dismissal or decertification:

* Know the details of state law in terms of "just causes" for dismissing and decertifying teachers
* Know the details of state law in terms of exact procedures to be followed in removing a teacher
* Know precisely the "property" or "liberty" interests that may characterize a teacher's contract status
* Make every effort to inform teachers (in writing) of deficiencies in their performance and help them improve within a "reasonable" period of time
* Know what constitutes adequate documentation
* Keep carefully documented files (open to teachers for inspection) regarding teachers' deficiencies and administrators' efforts to promote improvement
* Document a pattern of specific conduct and behavior that qualifies as "incompetence to teach," or "evident unfitness for teaching"
* Take advantage of any assistance that may be available from other district personnel in documenting a teacher's incompetence or unfitness to teach
* Make sure that charges against a teacher are based neither on personality conflicts nor on constitutionally protected rights of the teacher
* Give formal notice of discharge according to state statute and case law

Hearings. Some Advice.

When the board convenes in a dismissal hearing, the various roles (attorney, superintendent, board) change. The board's attorney, who usually acts in an advisory capacity to the board, may assist the administration in preparing the case against the teacher or he/she may serve as law officer during the hearing. He/she should not attempt to perform both functions; he/she should not attempt to be both prosecutor and judge.

The superintendent, who usually serves as executive secretary (or advisor) to the board, now brings charges against an employee before the board. The superintendent should not bring charges and serve as advisor simultaneously.

The board, which usually acts as a legislative body, now functions as a quasi-judicial body, hearing evidence and ruling, based on the evidence.

Any member of the board who will testify as a witness or who has any other conflict of interest should disqualify himself/herself or be excused by the board's adoption of a motion to disqualify him/her.

During the conduct of an open hearing, neither board members nor administrators should say anything that might damage an employee's reputation. If such discussions need to occur, they must occur in executive session or run the risk of a civil rights violation. If a board member should make a defamatory statement about an employee at a board meeting, the other board members should take some official action to indicate that the member is not speaking for the board. (Smith)

A local board president uses prepared agendas for the different kinds of hearings, to minimize the possibility of a procedural error on his part. The agenda for a teacher contract cancellation hearing goes like this. (See Appendix A.)

A final example, again from Alabama, might be helpful as a model. Mr. Donald

Sweeney, President of the Alabama Council of School Board Attorneys, prepared a sample letter for termination notification. It is very detailed and meets the Alabama statutory requirements. It includes:

- a statement that the board has accepted the superintendent's recommendation to consider contract termination
- reference to the Code of Alabama
- reasons for termination according to the Code of Alabama
- reference to an appendix which sets forth the specific charges, by statutory reason, summary of evidence and identifies witnesses
- sets the date, time and place of the hearing
- refers to the procedures specified by the Code
- notice of contest
- identification of employee's rights
- date notification was mailed
- signature of superintendent

The letter, with its appendix, is very detailed, but is does not leave any legal requirement unmet. Copies of these samples will be made available upon request. (See Appendix B.)

I hope that something from these remarks will be beneficial to some of you, at least.

Appendix A

Agenda for Teacher Contract Cancellation Hearing

President: This special meeting of the _____ Board of Education is called to order. (State, for the record, the date and time. Establish that a quorum is present, showing in the record who is absent.)

This meeting is called for the sole purpose of conducting a hearing for _____. The attitude of this Board shall be that _____ is innocent of the charge until the evidence proves otherwise.

Mr./Mrs./Ms. _____, have you been made aware of the charge(s) against you?

Do you have any objections to the hearing being held at this time?

(Explain rights of teacher)

- You have the right to be accompanied or represented by legal counsel. Are you represented by counsel? (State name of counsel for the record.)
- You have the right to testify or not testify. You may exercise that right at the appropriate time.
- You have the right to have this hearing open or closed. Please state whether you desire the hearing to be open or closed. (If open, proceed. If closed, direct all persons except the board, superintendent, teacher and counsel to leave the room.)

President: Does any member of this Board have any financial stake in this case? Does any member of this Board have any personal involvement in this case?

Has any member of this Board formed any opinions or otherwise pre-

judged this case?

I. Charge

President: Will the superintendent please read the charges against _____.

(Superintendent so reads.)

II. Conduct of Hearing

President: The Board will now hear opening statements. Does the superintendent wish to make an opening statement? (May decline; superintendent or his/her counsel may make the statement.)

Does ___(teacher)_____ wish to make an opening statement? (May decline; teacher or his/her counsel may make the statement.)

President: The procedures for presentation of witnesses will be:

A. Presentation of witnesses of Superintendent's office, with cross-examination

B. Presentation of witnesses by the teacher, with cross-examination

C. Rebuttal witnesses by Superintendent's office

After a witness has completed direct testimony and cross-examination, Board members will be allowed to ask questions for clarification. Such questioning shall not be for disclosure of new areas of information.

(Hear witnesses as outlined.)

III. Closing Argument.

President: Since the Superintendent's office has the burden of proof, it will have the opportunity for closing argument first. The teacher's counsel will them make its closing argument.

(Hear the closing arguments.)

IV. Deliberation

President: Does any Board member have a question regarding the recommendation? (Answer any questions.)

At this time this meeting of the Board will be closed while the Board deliberates. You will be notified within _____ days of the decision of the Board. (Excuse all persons except Board members and the recorder.)

(Source: Adapted from agenda of Huntsville (AL) Board of Education.)

Termination notification letter (sample)

NOTICE AND RECOMMENDATION TO TERMINATE CONTINUING SERVICE CONTRACT

To: _____ Teacher's name

_____ Address

YOU ARE HEREBY NOTIFIED that the Middletown City Board of Education (Board) has accepted the recommendation of the Superintendent to consider termination of your employment contract.

THIS NOTICE IS GIVEN pursuant to the provisions of Title 16-24-9 of the Code of Alabama, copy attached for your information and review.

REASONS FOR TERMINATION: The recommendation to terminate your contract is made in accordance with Title 16-24-8. Under this section, a tenured teacher may be discharged for the following reasons:

1. Incompetency;
2. Insubordination;
3. Neglect of duty;
4. Immorality;
5. Justifiable decrease in number of teacher positions; and
6. Other good and just cause.

You will find attached as an appendix a list of the specific reasons for the recommended termination of your contract and a list of witnesses which the Board expects to testify. This sheet also sets forth the date on which the Board met and accepted for consideration the recommendation of the Superintendent.

HEARING DATE: Under the provisions of Title 16-24-9, the Board will hold a hearing on this matter if you advise the Board in writing of your intention to contest this cancellation. The hearing will be as follows:

Time: _____

Date: _____

Place: _____

If you have any questions concerning the time and place, please call 111-1111.

PROCEDURE: Please carefully review the provisions of Title 16-24-9 (copy attached) which sets forth the procedure required by state law. If you have any questions concerning this procedure or your rights under the law, you should consult with your attorney or request information in writing to the Superintendent.

NOTICE OF CONTEST: If you decide to contest the recommendation to cancel your contract, you must advise the Board in **in writing** at least five (5) days prior to the date the matter is set for hearing. If the Board does not receive your notice stating your intention to contest the proposed cancellation within five (5) days of the hearing, the Board may proceed with the cancellation without a hearing.

If you request a hearing to contest the proposed cancellation, you should carefully review the provisions of Title 16-24-9 to determine your rights under the statute. At a contested hearing, your rights include the following:

1. To have a public or private hearing;
2. To appear with or without counsel;
3. To present the testimony of witnesses and other evidence;
4. To cross-examine adverse witnesses; and
5. To request the Board to subpoena witnesses to testify.

In the event that you need the assistance of the Board to subpoena witnesses which you will call on your behalf, please advise the Board in writing within five (5) days of the hearing of the name and correct addresses of each witness on whom you want a subpoena to be served.

If you have any questions concerning your rights and remedies under the Alabama Tenure Law (Title 16, Chapter 24, *et. seq.*) please ask for clarification.

This notice dated at _____, 1983.

MIDDLETOWN BOARD OF EDUCATION

BY: _____

Dr. John Doe
Superintendent and Secretary

BEST COPY

REASON FOR PROPOSED CONTRACT CANCELLATION

PLEASE BE ADVISED that the Middletown City Board of Education met on _____, 1983, and accepted the recommendation of the Superintendent that the Board consider termination of your contract for the following reasons:

1. Statutory Reason: Neglect of Duty

   Evidence: All teachers are advised never to leave their classroom unattended for substantial periods of time. On May 3, 1983, you left your third period class unattended for over 30 minutes. During this time, two students were seriously injured in a fight. This violation of board policy constituted neglect of duty.

   Witnesses: The following witnesses are expected to testify on this issue.

   Mrs. Jane Day will testify that your classroom was unattended from 10:00 until 10:30.

   Sammy Jones will testify that during your absence, he was hurt in a fight with two other students.

2. Statutory Reason: Insubordination

   Evidence:...

   Witnesses:...

3. Statutory Reason: Incompetency

   Evidence:...

   Witnesses:...

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